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ORIGINAL ARTICLE

Delivering sustainable drainage systems through the English planning system: A proposed case of institutional void

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Abstract

Following a series of flood events, the major flooding of 2007 finally triggered legislative change through the *Flood and Water Management Act* of 2010 and proposed the introduction of Schedule 3 (S3), to provide a stronger regulatory system for the implementation of sustainable drainage systems (SuDS). However, S3 has been abandoned in England in favour of implementing SuDS through a “strengthened” planning system. By taking a broader governance perspective, this article explores the limited uptake of SuDS through the strengthened planning system. We argue that the so-called strengthening of the planning system creates an institutional void: a lack of policy clarity that occurs when the role of the state is scaled back and other actors take up governance roles. While institutional voids can create successful outcomes, in the case of SuDS implementation they have been sub-optimal. We trace the cause of these outcomes to the unwillingness of the Government to engage in designing policy. This creates a lack of consistency and uniformity, as the implementation of SuDS becomes a matter of ad hoc negotiations and power relations between local authorities and developers. We conclude that the current policy has reduced potential to deliver better outcomes and highlight the options for increased SuDS uptake going forward.

KEYWORDS

governance and institutions, institutional void, Schedule 3, spatial planning, surface water, sustainable drainage systems

1 | INTRODUCTION: PLACING “STRENGTHENED PLANNING POLICY” FOR SuDS IN CONTEXT

The severe UK summer floods of 2007 triggered a national review of flood risk management (Pitt, 2008), which led to proposed new legislative and institutional arrangements in

England and Wales through the introduction of the *Flood and Water Management Act* (FWMA) 2010. The most significant feature of the 2007 flood events was perceived to be the high proportion of surface water flooding, and the 2010 Act responded to calls for urgent, broader changes in the way the country adapted to the likelihood of more frequent and intense periods of heavy rainfall (Pitt, 2008).

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The overall aim of the FWMA 2010 was to simplify and provide more adequate integration of what was considered to be a fragmented surface water and flood risk management system. Amongst the new arrangements, “Schedule 3” (S3) of the FWMA set out requirements for developers to consider their impact on sewerage and drainage networks and to make greater use of sustainable drainage systems (SuDS). Rather than the traditional practice of drainage through pipes or concrete structures to sewers, SuDS aim to mimic natural mechanisms of drainage or movement of water, soaking up surface water through permeable surfaces or draining to a surface water body, for example, using wetlands, swales, retention ponds, green roofs, and rain gardens. As well as reducing the load on the conventional drainage system, SuDS are also seen to bring multiple benefits to the urban and rural environment in the form of improvements in water quality, biodiversity, amenity, air quality, temperature regulation, carbon sequestration, and health and well-being (Woods Ballard et al., 2015).

Prior to the shock flood events and the ensuing FWMA 2010, the planning system and its attendant development management process had been considered pivotal in “actively encouraging” the use of SuDS in new development. SuDS policy measures had been formally introduced into planning policy in England in 2001 (Department for Transport, Local Government, & the Regions, 2001). However, a lack of clarity in objectives and standards in practice, in addition to uncertainty regarding funding and adoption issues, is thought to have prevented SuDS implementation becoming the norm (Ellis & Lundy, 2016). In 2014, the Committee on Climate Change (Adaptation Sub-Committee) reported low uptake of SuDS in England in the previous 5 years (between 2009 and 2014); in their review of 111 planning applications, they found that “only 12 applications [had] firm proposals for attenuation ponds/swales and only 15 applications advocating the use of permeable paving as part of the overall strategy¹” (Adaptation Sub-Committee, 2014, p. iii). The commencement of Schedule 3 of the 2010 Act would have specified additional legislative support and new institutional arrangements believed necessary to move the approval and adoption of SuDS beyond “active encouragement” via the planning system. They were designed to increase the use of SuDS in all new developments through the publishing of national, statutory standards and the establishment of approval bodies for SuDS (separate to planning), within upper-tier local authorities (LAs), who in addition would take on their maintenance (Ashley, 2014).

Following the UK national elections in 2011, fought over the period of a severe economic crisis (Tait & Inch, 2016), the FWMA 2010 was inherited in England from the Labour Government by the incoming Conservative/

Liberal Democrat Coalition Government.² The intentions of the FWMA 2010 for SuDS to be regulated were resisted by the Government with an English localism agenda set on “decentralising power, freeing citizens from the dead-weight of the state” (Tait & Inch, 2016, p. 175). This was seen within the water management industry to be a response to vigorous lobbying from developers (Ashley, 2014). Following a series of unclear announcements and consultations from the Department for Environment, Food and Rural Affairs (DEFRA), the period of confusion concluded with a statement in the House of Commons by the Secretary of State for Communities and Local Government (then Mr Eric Pickles), explaining how the use of SuDS would be secured by “strengthening existing planning policy” (Department for Communities and Local Government, 2014).

The government presents the planning system as providing a more responsive form of governance, while the evidence available suggests that the delivery of SuDS through the planning system to date has delivered sub-optimal results. *A place for SuDS?* report, based on *The Big SuDS Survey*, discovered that only 40% of all planning applications submitted in England contained SuDS, with 75% of the respondents to the survey stating that the planning system does not encourage SuDS sufficiently (Grant, Chisholm, & Benwell, 2017). The Landscape Institute survey found that, of all the applications submitted to Lead Local Flood Authorities (LLFAs), “just 3% of authorities considered the information received to be adequate” (Landscape Institute, 2019, p. 15). While research has already shifted from a previous dominance on the technical aspects (design or construction) of SuDS (this shift as first evidenced by White & Howe, 2005) to the challenges of establishing SuDS provision through land use and development planning (Ellis, 2013; Ellis & Lundy, 2016; White & Howe, 2005), this article offers a contribution to the debate by taking a broader governance perspective. We look to explore why there has been such limited uptake of SuDS through the current policy arrangements, which are focused on SuDS implementation through the so-called strengthened planning system.

The core argument of our paper is that the “strengthening” of the English planning system to deliver SuDS has led to the creation of an “institutional void”: a lack of clarity in the content and measurements of policy that occurs when the functions of the state are scaled back, and non-state actors are taking on governing tasks (Hajer, 2003). The first section of the paper will introduce the notion of the institutional void and place it in the context of debates about governance and policy assessment. In the second section, “The institutional void in current SuDS policy implementation,” we will demonstrate how the institutional void thesis applies to SuDS policy. While

institutional voids can be characterised by positive outcomes, especially where appropriate regulations and collaborative processes are in place, in the case of SuDS policy we argue that this leads to the sub-optimal outcomes witnessed to date. In the third section, “Suboptimal outcomes and ‘non-design’ in the institutional void,” we argue that the backdrop for these outcomes is constituted by the unwillingness of the Government to engage in designing policy, which insists on maintaining the implementation of SuDS through the current planning system. This leads to the implementation of SuDS becoming a matter of power relations between developers and LAs, a sub-optimal situation where LAs lack the power or capacity to secure SuDS in a consistent manner.

2 | THE INSTITUTIONAL VOID: AN ALTERNATIVE CONCEPTUALIZATION OF SuDS POLICY

2.1 | The institutional void thesis

We place the surface water management issues and SuDS policy in the new modernity of Hajer (2003) and what he described as changes in the way that our society is governed, broadly characterised as a shift in regulation from government to governance. Hajer (2003) had observed that in the new modernity, solutions for pressing and complex environmental problems are not always found within the boundaries of traditional institutional arrangements. A growing societal awareness of the unintended, perverse consequences of large-scale rationalised planning, and the perceived limits to centralised, hierarchical regulation, had led to the state working in flexible arrangements with a multiplicity of actors to solve policy problems (Hajer, 2003). These more interactive and deliberative practices were tasked with the framing of shared problems, to draw on local knowledge and build up shared knowledge to discuss possible solutions as well as building greater trust and credibility in the actors involved (Hajer, 2003). We can see the pervasiveness of Hajer's observations and ideas in practice and in the water management literature. For example, the acknowledgement that decision making in flood risk management has usually been implemented through a top-down approach without sufficient involvement of stakeholders. This has been attributed to blockages and deadlocks in the implementation of the proposed novel measures (Almoradie, Cortes, & Jonoski, 2015). Instead, the management of flood risk as a complex and dynamic problem calls for innovative ways of engaging with a wide range of local stakeholders (Maskrey, Priest, & Mount, 2018).

Hajer (2003) specifically referred to experiments in the applied sphere of collaborative or stakeholder planning in the United Kingdom (Healey, 1997). In such experiments, where a wide variety of stakeholders frame shared problems and discuss possible solutions, the key is that governmental agencies participate but do not dominate the deliberation. Policymaking here is extended beyond the sphere of mere rule-creation. It becomes a matter of defining an agreed-upon package of actions to be taken by a variety of stakeholders, often supported by soft law such as covenants or agreements that are perhaps backed up by regulatory frameworks. Hajer (2003) argued that the new governance arrangements take place in what he termed an “institutional void,” because there are fewer and less explicit rules (i.e., bureaucracy) according to which decisions would be made. He did originally question whether these new practices would be the new carriers of political democracy and believed that there was no guarantee that these new policy practices would combine effectiveness with legitimacy, foreseeing that existing political players could capture these new political spaces. The informality of the institutional void was considered important to enable innovative forms of governing to emerge, but it was also seen to have the potential to generate problems of internal and external accountability (Lau, 2013).

2.2 | Three potential sets of outcomes of policy-making in the “institutional void”

Leong (2017) has summarised earlier studies of policy-making in the institutional void and categorises three potential sets of outcomes that can emerge. First, that policy-making in the institutional void can be highly productive. This is the case where deliberative and collaborative forms of governance have been evidenced, whereby actors have had the ability or willingness to frame shared problems, develop an understanding of different viewpoints, and discuss possible solutions to their particular “wicked problem” (Hajer, 2003; Leong, 2017). Second (and notably—predominantly), policy-making in an institutional void is seen to lead to sub-optimal policy outcomes (Leong, 2017; Measham et al., 2011). Although local governments accept a policy issue as important, they develop ineffectual policies, there is an absence of clear definitions of institutional roles and responsibilities, and such uncertainty in policy-making leads to maintenance of the status quo and poor implementation of a novel policy (Measham et al., 2011). While the majority of Leong's studies reveal the poor quality of decisions emanating within the institutional void, a third set of outcomes has been characterised in more neutral terms as

contingent upon a series of background conditions and factors being in place, including appropriate regulation, norms, or political support (Leong, 2017; Stilgoe, Owen, & Macnaghten, 2013).

Hajer's (2003) recommendation to policy analysts was not to deny the new field of experimentation, but instead to pay careful attention and come to an assessment of the contribution of these new practices and that the literature should also address the explicitly normative issues that come with the introduction of these new practices. In the next section, we turn our attention to the evidence on the implementation of sustainable drainage, first setting out the detail of the strengthened English planning system against the original intentions of Schedule 3. Our account is based on a reading and analysis of key government policy statements, ministerial statements, and policy-related documents and literature dating from 2008 to 2018. Policy documents and professionals from "England" have been selected for the purpose of analysis in this paper, rather than the "United Kingdom," due to the complexities of devolved administrations and different policy prescriptions in England, Scotland, Northern Ireland, and Wales. Different government departments and agencies operate, and planning and flood-risk management policies and strategies are set and implemented independently from the national (United Kingdom) level. Wales was also subject to the FWMA 2010, and has implemented Schedule 3 arrangements. Our focus in this paper is on England, to thus investigate whether the institutional void thesis applies to current English SuDS policy. To this purpose, we make extensive use of the data arising from the published written evidence appended to the *6th Report of the Post-legislative scrutiny: Flood and Water Management Act 2010* (House of Commons Environment, Food and Rural Affairs Committee, 2017a) and the Government's response to said report (House of Commons Environment, Food and Rural Affairs Committee, 2017b). The written evidence was submitted by 45 stakeholders (including LAs, water companies, environmental NGOs, Flood Action Groups, housebuilders, Home Builders Federation, Association of British Insurers, National Farmers Union, members of the public, other professional bodies, private and third-sector organizations) who documented their opinions on the English planning system's effectiveness to deliver SuDS, set against the original proposal of Schedule 3 implementation. For the rest of this paper, we quote the written evidence submissions to the post-legislative scrutiny by the name of the stakeholder followed by WE, which stands for written evidence (for example, CIWEM WE; Somerset County Council WE; National Flood Forum WE; etc.). The arguments presented in the paper have also been informed by a secondary analysis of the

data arising from the largest independent survey on SuDS in the United Kingdom to date, administered by the Chartered Institution of Water and Environmental Management (CIWEM) (Grant et al., 2017; Melville-Shreeve et al., 2018).

3 | INSTITUTIONAL VOID IN THE CURRENT SuDS POLICY IMPLEMENTATION

3.1 | From Schedule 3 to "strengthened" planning policy

To better assess the nature of current SuDS policy, it is useful to understand how it differs from the S3 of the FWMA. The original intentions of S3 were to make the requirement for SuDS mandatory on new developments, complying with new mandatory and comprehensive National Standards on SuDS, which would have set out how drainage systems should be designed, constructed, and maintained. A SuDS approval body (SAB), separate to planning, would have been created in each upper tier (unitary or county) authority with the power and responsibility to approve (or refuse) SuDS against compliance with the new national mandatory standards. SABs would also have been required to adopt and maintain the systems constructed in compliance with the national standards. However, after a series of delays and two major public consultations between 2012 and 2014 (Department for Environment, Food and Rural Affairs, 2012; Department for Environment, Food and Rural Affairs and Department for Communities and Local Government, 2014a, 2014b), it was announced that SuDS would be secured by strengthening existing planning policy (Department for Communities and Local Government, 2014).

In England, the National Planning Policy Framework (NPPF) from 2012 has set out the Government's policy on how Local Planning Authorities should approach planning decisions on proposed development (Department for Communities and Local Government, 2012). In strengthening planning policy, the Government's expectation was for local planning policies and decisions on planning applications relating to major development (10 dwellings or more; or equivalent non-residential or mixed development) to ensure that SuDs for the management of run-off were put in place, unless demonstrated to be inappropriate (Department for Communities and Local Government, 2014). The existing requirement in NPPF 2012 that all new developments in areas at risk of flooding should give priority to the use of SuDs also continued to apply. The NPPF and associated planning practice guidance (Flood Risk and Coastal Change) published

in March 2014³ state that priority should be given to the use of SuDS and a hierarchy of acceptable discharge solutions established—SuDS as preferred and connection to the sewer is the least preferred (albeit still permissible) (Department for Communities and Local Government, 2012, 2014). The management of run-off has been introduced as a material consideration, meaning it is substantial matter that will need to be taken into account when determining an application (Department for Environment, Food and Rural Affairs and Department for Communities and Local Government, 2014b). Generic non-statutory technical standards for SuDS were published by DEFRA in March 2015 (Department for Environment, Food and Rural Affairs, 2015), covering flow controls (peak and volume) and a brief detail on the design and maintenance of SuDS (Ellis & Lundy, 2016). Although water quality was covered in an earlier draft version, it is not considered in the final standards (2016).

The details of the two sets of arrangements for SuDS, initial proposals for Schedule 3 and the strengthened planning system, are outlined in Table 1 below.

The comparison of the original intentions of the S3 and planning policy highlights two very different approaches to implementing SuDS. S3 was designed to be a highly regulatory policy that would have ensured SuDS on all new

development, potentially at the cost of increased bureaucracy. Planning policy can be characterised as a more flexible form of governance, backed by light regulation, making use of already existing arrangements and which benefits from wider stakeholder involvement. However, we argue that strengthened planning policy can be more accurately characterised as an institutional void, as we will show in the following section.

3.2 | Multiplication of non-state actors and the diminishing role of the state

One of the more visible differences between planning policy and S3 relates to the multiplication of non-state actors, who are now taking up governance roles. When it comes to maintenance of SuDS, for example, the SAB would have been required to ensure the maintenance of SuDS adopted in accordance to national statutory standards. Planning policy states that planning conditions can be used by Local Planning Authorities to ensure that developers have firm plans for the maintenance of SuDS (Department for Environment, Food and Rural Affairs and Department for Communities and Local Government, 2014b). In the first public consultation, it was proposed that it is best left “open to the developer to maintain the SuDs themselves or [...] a third party [such as maintenance company, the LA, local residents or another undertaker]” (Department for Environment, Food and Rural Affairs and Department for Communities and Local Government, 2014a, p. 11). This was reiterated by the Government in the second consultation, which regards the arrangement along democratic and participatory lines, as it encourages the participation of all interested parties in flood-risk management (Department for Environment, Food and Rural Affairs and Department for Communities and Local Government, 2014b). The existing planning mechanism suggests, at least in theory, that an agreement must be reached by the Local Planning Authorities and the developer, which stipulates which actor will take up the task of maintenance.

However, the introduction of non-state actors to take responsibility for maintaining SuDS is problematic because, in practice, the maintenance of SuDS represents the greatest barrier to SuDS adoption (Grant et al., 2017). All submissions to the *6th Report of the Post-legislative scrutiny of FWMA* (House of Commons Environment, Food and Rural Affairs Committee, 2017a) have identified maintenance as an on-going major problem. Management companies are seen to be unreliable and inconsistent in the process of maintaining SuDS; “management companies have been found to be unresponsive when issues arise, and have a tendency to ‘disappear,’

TABLE 1 Direct comparison of proposed SuDS delivery arrangements, England, United Kingdom

| Flood and Water Management Act 2010 Schedule 3 arrangements | Strengthened planning policy arrangements |
|---|---|
| SuDS mandatory on new development | Local planning policy to give priority to and ensure SuDS put in place, unless demonstrated to be inappropriate |
| SuDS to comply with national mandatory standards | Non-statutory SuDS technical standards published by DEFRA |
| SAB with power and responsibility to approve SuDS against statutory standards | Management of surface water a material consideration to be taken account of when determining a planning application. Planning conditions and obligations as the tool to secure SuDS |
| SABs to adopt and maintain in compliance with national standards | Applicants to ensure minimum operational standards, have appropriate maintenance in place, and, where possible, provide multiple benefits |

Abbreviations: DEFRA, Department for Environment, Food and Rural Affairs; SAB, SuDS approval body; SuDS, sustainable drainage systems.

a phenomenon that leads to ‘orphan SuDS,’ which fall into disrepair” (Grant et al., 2017, p. 25). LAs have responded to the issue by requesting details of the management company at the planning stage to enable steps to take enforcement action, but “management companies can transfer sites on or change ownership” (Wildlife Trusts WE). Questions have been raised regarding longer term maintenance; “there are significant concerns that management companies will declare themselves bankrupt and that they will lack the funds to replace assets in 25 or 30 years’ time” (National Flood Forum WE). The lack of clear and consistent arrangements for maintenance has also been argued to have a negative impact on the fundamental choice and design of SuDS; “developments are often built to the option that is easiest to maintain, not necessarily taking into account the widest benefits (as not all of these can be monetarised into profit for the developer)” (Grant et al., 2017, p. 25).

In parallel with the introduction of non-state actors in governing SuDS, there has been a gradual diminishing of the role of the state (we refer here primarily to local government and its functions). In theory, planners, along with other experts in the LA (such as drainage engineers or landscape architects), become central figures in the implementation of SuDS. This seems to indicate that the role of local government has not diminished but remained relevant and prominent. However, the evidence so far suggests that the reality is different; “the weakness of current planning requirements is exacerbated by a lack of resourcing and guidance for local planning authorities, which rarely have the wherewithal to assess the merits of an application in any detail or argue a case with a major developer” (Grant et al., 2017, p. 24). A reading of the written evidence to the *6th Report of the Post-legislative Scrutiny of FWMA* reinforces this finding: 83% of respondents that answered the SuDS-related questions flag up the lack of skill and resources in LAs, and 75% of survey respondents to *The Big SuDS Survey* stated that planning authorities do not have adequate expertise to consider the merits of proposals and opt-out applications (Grant et al., 2017).

Pre-application discussions are considered to be of key importance for quality SuDS delivery, in which the developer and the LA can identify and negotiate the early design and adoption issues before the planning application is formally submitted and encourage a discussion with other statutory consultees. In practice, evidence suggests that pre-application engagement is often limited (Somerset County Council WE), with any pre-application advice that is offered varying in standard considerably at a national level (Grant et al., 2017). Furthermore, it is possible for outline planning permission to be granted in the absence of a final housing layout or SuDS design as part of the development management process (Ellis &

Lundy, 2016). If the housing detailed design becomes a “reserved matter,” the implication is that the SuDS design cannot be considered at the vital early stage and planning conditions are thus attached to the planning consent in the absence of sufficient information. Detailed designs can return as part of reserved matters applications, with a new drainage strategy that differs from the original, either downgrading the quality or eliminating SuDS entirely from the final development (Somerset County Council WE).

The written evidence submissions highlight a further series of consequences that derive from the lack of skill and resources in local government. LAs are perceived to act to a minimum standard (National Flood Forum WE) and are deemed unable to suitably assess the effectiveness of SuDS at the planning application phase (Wildlife Trusts WE), which also results in delays in the approval of applications (Home Builders Federation WE). There is also seen to be a source of ambiguity when it comes to establishing whether SuDS once constructed are maintained properly. Seventy-five percent of participants in *The Big SuDS survey* “believed the local planning authorities did not have the expertise (or capacity and skills) necessary to check and advise on quality SuDS deployment” (Melville-Shreeve et al., 2018, p. 14). LAs are seen to suffer from a lack of resources to monitor the construction of SuDS and their lifetime performance, reliant upon “generic” building inspectors to “sign off” developments, rather than specialised SuDS engineers (Cornwall Community Flood Forum WE). The lack of capacity also undermines the planners’ capacity to enforce planning conditions (National Flood Forum WE), typically only brought into effect by a public complaint or in the event of a large flood overwhelming a drainage system and/or causing properties to flood (Southampton City Council WE; Somerset County Council WE). The Government was aware of skills shortages and lack of human resources as far back as 2014, when it proposed to address them through a “capacity-building programme” (Department for Environment, Food and Rural Affairs and Department for Communities and Local Government, 2014a, p. 1), which was reiterated within the Secretary of State’s statement in the House of Commons (Department for Communities and Local Government, 2014). Current evidence suggests that such a programme either has not been implemented or has been unsuccessful.

3.3 | Lack of clarity over norms, rules, and policy measures

As documented above, the multiplication of actors and the diminishing capacity of the state can lead to undesired and precarious situations where the maintenance or

construction of SuDS proves inadequate. This, however, appears to be a symptom of the larger issue constituted by the lack of clarity over the norms, rules, and measures of policy. Several submissions to the *6th Report of the Post-legislative Scrutiny of the FWMA* (House of Commons Environment, Food and Rural Affairs Committee, 2017a) draw attention to the ambiguity in both the language used in the Ministerial Statement (Department for Communities and Local Government, 2014) and the subsequent planning guidance regarding the specific details of SuDS policy implementation. For example, the Ministerial Statement argues that SuDS “should be designed to ensure that the maintenance and operation requirements are economically proportionate” (Department for Communities and Local Government, 2014). However, economic proportionality is a poorly defined policy principle that works in favour of the developers at the expense of LAs, whereby “the definition of cost is drawn extremely narrowly, relating only to the costs incurred by the developer, with no reference to direct costs or opportunity costs for other parties, or the relative benefits (financial and otherwise) of SuDS options compared with conventional drainage” (Wildfowl & Wetlands Trust WE). The Wildfowl and Wetlands Trust submission further stresses that the planning guidance to the NPPF (Department for Communities and Local Government, 2012) provides cost (of design, maintenance, operation, and land taken by an SuDS feature) as a ground on which developers can argue against SuDS. Developers do not need to provide evidence to support their viability claims or submit information regarding the cost of the conventional drainage used for purposes of comparison with SuDS. This suggests that the language used in planning policy is non-committal and presents a series of caveats, which act as loopholes in practice, allowing room for negotiation for the parties that lack the incentive to implement SuDS.

The issue of lack of clarity or ineffectual policy can also be identified in practice in negotiations between LAs and developers over the very nature of an SuDS feature; “suggesting SuDS are a conventional drainage system with a store at the bottom end in the form of a tank or basin [...] is not within the SuDS principles” (Sheffield City Council WE). The Environmental Industries Commission alleges that “DEFRA has published ‘non-statutory’ standards for SuDS that were concluded ‘in discussion with the water sector and house builders’ and that ‘the final technical standards were relatively rudimentary compared to what was originally a more comprehensive draft’” (Environmental Industries Commission WE). DEFRA (2015) standards refer exclusively to flow control and flood-risk management, the guidance lacking discussion of other important characteristics of SuDS, notably to improve biodiversity or water quality. This thus establishes the backdrop for a back and forth

between LAs and developers in negotiating what constitutes SuDS. It is suggested that LLFAs bow to the lower quality solutions of the developers, as they cannot argue the case for a “better version” of SuDS (Sheffield City Council WE). The Home Builders Federation’s submission states that developers regard higher SuDS standards as excessive, and as “there is no authoritative definition of SuDS [...] each local planning authority and/or LLFA has the ability to define and apply its own interpretation of SuDS and not necessarily one that is consistent with the non-statutory national standards” (Home Builders Federation WE).

As the submission from Anglian Water states: “there currently remains a void in both the delivery and adoption of SuDS, and significant ambiguity within the planning system that is unhelpful for LAs, water companies and developers, which reduces the incentive to include such schemes in new developments” (Anglian Water WE). This section has argued that SuDS policy can be characterised as taking place in an institutional void. This means that there is a dual dynamic at play: as the functions of the state diminish, other actors are taking up governing tasks (such as developers and management companies), introducing a lack of clarity when it comes to the rules, norms, and measurements of policy. For example, this was seen in the non-committal language of the legislation, which creates room for developers to advance their own interpretations, standards, or measurements in negotiations with LAs (e.g., opt-outs on cost considerations, what constitutes a SuDS feature). It should be stressed that, echoing Hajer (2003), we are not suggesting that policy-making in the institutional void is negative or detrimental per se, or that non-state actors do not have a place in governance. However, we are arguing that the success of the policy needs to be assessed in relation to the policy outcomes it produces. The evidence so far for SuDS policy is that these outcomes are sub-optimal and that it is not implemented in the best way possible to higher quality standards. In the next section, we will suggest an explanation for these outcomes and identify the current trends in SuDS policy.

4 | SUB-OPTIMAL OUTCOMES AND “NON-DESIGN” IN THE INSTITUTIONAL VOID

The written evidence submissions, as analysed above, echo many of the findings presented in *A place for SuDS?* report (Grant et al., 2017) and further document the limited confidence in the industry that SuDS are being incorporated effectively into new developments under current planning policies. The institutional arrangements are thus considered inadequate for securing flood protection

and wider environmental gains. The only notable differences in opinion are documented by the Home Builders Federation, who consider the planning system the most effective mechanism for SuDS delivery, and National Farmers Union, who propose better use of the current institutional arrangements rather than changes. In this section, we will provide an explanation for the sub-optimal outcomes and seek to identify the current trends in SuDS policy. We will employ a documentary analysis of the *6th Report of the Post-legislative scrutiny of the FWMA 2010*, namely the report of the House of Commons Environment, Food and Rural Affairs committee analysing the written evidence submissions (House of Commons Environment, Food and Rural Affairs Committee, 2017a) and the Government's response to the findings of the report (House of Commons Environment, Food and Rural Affairs Committee, 2017b), as we argue that this is where the current trends can be identified clearly.

The overarching conclusion from the EFRA final report was that the committee was “not persuaded that it is currently essential to commence Schedule 3 of the Act in order to improve the SuDS regulatory framework [...] rather, we recommend that the Government strengthens planning approaches” (House of Commons Environment, Food and Rural Affairs Committee, 2017a, p. 1). The EFRA report did suggest that “if policies fail to provide as robust a regime as that under the FWMA by the end of 2018, we consider it would be appropriate for that Committee to consider recommending commencement of Schedule 3 measures” (House of Commons Environment, Food and Rural Affairs Committee, 2017a, p. 4). The Government's response concurs, re-stating that there is enough clarity through NPPF and planning guidance to obtain both flood protection and environmental outcomes associated with the use of SuDS. The Committee's report did however raise the concerns from stakeholders that the lack of clarity over maintenance persists as one of the biggest barriers to SuDS implementation, requesting that the Government clarify a more efficient way to secure long-term maintenance and also that “the Government should enshrine standards for the design of SuDS in statute” (House of Commons Environment, Food and Rural Affairs Committee, 2017a, p. 2). The Government in response stated that “the local planning authority should be satisfied that there are clear arrangements in place for ongoing maintenance” and that “this approach provides flexibility for developers and local planning authorities to identify and agree the most appropriate arrangements” (House of Commons Environment, Food and Rural Affairs Committee, 2017b, p. 2). The request for statutory standards was rejected, the Government claiming that “statutory design standards would not increase uptake of SuDS and would

risk stifling innovation” and that “seeking legislative change to make statutory standards for SuDS does not offer clear benefits over current arrangements” (House of Commons Environment, Food and Rural Affairs Committee, 2017b, p. 2).

The analysis above shows that there is a discrepancy between the views of the stakeholders that submitted evidence, which signal major issues with the “strengthened” planning policy, and the Government, which has rejected all of the recommendations, insisting that the current policy provides appropriate tools for SuDS implementation. Instead, in July 2018, the Government published a revised NPPF (Department for Communities and Local Government, 2018), seeking to introduce further clarifications regarding SuDS. The NPPF now states that development in areas of flooding can be allowed only where it incorporates SuDs (para 163) and that major development should incorporate SuDS (para 165). Both recommendations are again followed by a qualification that this is the case “unless there is clear evidence that this would be inappropriate” (Department for Communities and Local Government, 2018, p. 47). Furthermore, it is recommended that applicants need to take into account advice from LLFAs, ensure minimum operational standards, have appropriate maintenance agreements in place, and, “where possible,” provide multiple benefits (Department for Communities and Local Government, 2018, para 65, p. 47). The revised NPPF is characterised by the same ambiguous, non-committal language as NPPF 2012. As we have seen above, this is likely to replicate the same loopholes that are currently manifested in SuDS policy practice.

We have insisted on the interplay between the EFRA report, the response of the Government, and the written evidence from stakeholders because they allow us to gauge the state of SuDS policy and its direction of travel, which sees the Government set on maintaining a discretionary approach that has, at least to date, delivered sub-optimal outcomes. Leong (2017) suggests that sub-optimal outcomes in the institutional void occur at the intersection of a Government's low intention to design policy and its inability to change the status quo. We see that there is not only a low desire to design policy but also an unwillingness to change the status quo. The Government has responded negatively to all the recommendations of the report, in effect keeping the status quo intact. We argue that SuDS policy takes place in a “static non-design space” (Howlett & Mukherjee, 2014; Leong, 2017). Here, the Government only retains a steering role, through strategic selectivity (Jessop, 1990). It decides which actors and institutional configurations are to be favoured in terms of power and resource allocation (Galland, 2012), but it does not undertake any policy design. This does not mean that

it is not possible to implement SuDS through the “strengthened” planning system. The suggestion we are making is that this implementation will likely remain inconsistent and non-uniform. This is most evident when compared with S3, which would, at least in theory, guarantee that all applications that were approved would have SuDS features. The institutional and practical effects of the policy are that it provides neither stick nor carrot. Developers are missing an incentive to implement SuDS, as the legislation offers them a series of loopholes they can use to opt out. LAs are missing the legislative backing and the resources to impose a consistent hard line or/and offer valuable incentives to the developers to implement SuDS. Given this backdrop, we infer that SuDS in new developments are likely to become a matter of ad hoc negotiations and power relations between developers and LAs. This is an institutional configuration that exists de facto: a by-product of the lack of policy design. Where the institutional void occurs and particularly where norms are unclear, Leong (2017) suggests we will find a policy space that is “filled with the sort of policies postulated (poorly informed)” (p. 579). Earlier academic criticism of the new governance has already focused on Hajer’s (2003) identification of the institutional void and a resultant democratic deficit (Lau, 2013). Although collaborative forms of governance involve a diverse range of stakeholders, this may not necessarily correct the biases of powerful players, especially if existing power relations are constructed as a legitimate part of the governance process (Lau, 2013).

5 | CONCLUSIONS

The CIWEM report, *A place for SuDS*, concludes by stating that “the Government chose not to commence Schedule 3 of the Act [FWMA] to avoid what it perceived to be a surfeit of bureaucracy; unfortunately, this has created a void of effective policy” (Grant et al., 2017, p. 30). In this paper, aided by the relevant academic literature, we have sought to analyse the broader governance dynamics (political, legislative, and institutional) around SuDS policy and implementation in England. We have argued that the Government appears to be unwilling to engage in designing regulatory policy, insisting on maintaining the implementation of SuDS through the current planning system, which is characterised by an institutional void. In practice, there are few to no incentives available for implementing SuDS, which then become a matter of power relations between developers and LAs. Combined with a shortage of financial resources, skill, and institutional capacity, LAs find themselves unable to secure the SuDS in new developments in a consistent manner (Grant et al., 2017; Melville-Shreeve et al., 2018). This

helps explain the occurrence of sub-optimal outcomes in current SuDS policy implementation.

Overall, our conclusion is that the Government has not strengthened planning policy enough to secure optimal SuDS outcomes and that is favouring status quo. In response to these challenges, other academic commentaries suggest an approach that favours amendments to the current policy (Grant et al., 2017; Melville-Shreeve et al., 2018). Ellis and Lundy (2016) suggest that if SuDS are to become the norm, there needs to be “clarity of objectives, standards and practice as well as certainty regarding funding and related adoption issues” (p. 635). CIWEM’s report, *A Place for SuDS?* calls for repealing the automatic right to connect to conventional drainage systems, pushing for comprehensive statutory standards, and clarifying the issue of adopting SuDS (Grant et al., 2017). While these are steps in the right direction, the issue of the lack of capacity at the level of LAs, combined with the inconsistency of the planning arrangements in England and the Government’s preference for status quo, is still likely to undermine the uniformity and quality of SuDS outcomes. The adoption of S3 in Wales, which has come into effect in January 2019, provides our future research a window into the potential for a more integrated regulatory framework. Further comparative research will be required to analyse the progress of a regulatory style of SuDS policy implementation as, for example, by the Welsh Government in the coming years, against SuDS policy in England.

The persistence of the current system for delivering SuDS engenders negative consequences for the flood-risk management in England. The increase in the occurrence of flash and pluvial floods brings with it an increase in uncertainty, especially when considering that they can affect areas with no apparent history of flooding (Penning-Rowsell & Korndewal, 2018). Surface-located, high-quality SuDS are an appropriate solution for tackling these kinds of flood events while providing a host of other important benefits. However, we have documented that such SuDS are not being delivered consistently and sufficiently. Furthermore, when they are delivered, there is little expertise or resources in LAs to assess whether they are being constructed and maintained properly. As this paper has shown, inquiring into the broader governance processes is one of the most prescient tasks, as it has major institutional and practical implications for the implementation of SuDS.

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DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

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ENDNOTES

¹ NB. It is not clear from the review to what extent the applications with permeable paving overlap with the applications with attenuation ponds/swales.

² To note that the FWMA 2010 applies to both England and Wales. Law and powers in relation to flood risk management are largely devolved in Wales to the Welsh Ministers. Wales has different government departments and agencies, setting and implementing policy independently from the national (United Kingdom) level. The Welsh Government proceeded with the implementation of Schedule 3, making sustainable drainage systems on new developments mandatory and to be built in accordance with Statutory SuDS Standards from January 7, 2019 (see: <https://gwedhill.gov.wales/topics/environmentcountryside/epq/flooding/drainage/?lang=en>).

³ Particularly relevant to paragraphs 79–85 of the Planning Practice Guidance—available at <https://www.gov.uk/guidance/flood-risk-and-coastal-change#planning-and-flood-risk>

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